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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-495

INVESTORS DIVERSIFIED SERVICES, INC., INVESTORS VARIABLE PAYMENT FUND, INC. and IDS NEW DIMENSIONS FUND, INC.,
Petitioners,

v.

JACOB SCHEIN and MARVIN H. SCHEIN,
Respondents.

INVESTORS DIVERSIFIED SERVICES, INC.,
Petitioner,

v.

ANTONE F. GREGORIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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January 17, 1974

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

This brief is submitted on behalf of petitioners Investors Diversified Services, Inc. (hereafter "IDS"), and Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc. (hereafter "the funds"). Petitioners ask reversal of a decision of the United States Court of Appeals for the Second Circuit, which reversed the dismissal of these actions by the United States District Court for the Southern District of New York.

Opinions Below

The opinions of the Court of Appeals, reported at 478 F.2d 817, and the opinion of the District Court, reported at 335 F.Supp. 329, appear in the appendix (61a, 50a).

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1973, and a timely petition by these petitioners for rehearing with a suggestion for rehearing in banc was denied on June 18, 1973. A timely petition for certiorari, filed on September 17, 1973, was granted on December 3, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals for the Second Circuit err in not certifying questions of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure? 1A Fla. Stat. Ann. Sec. 25.031, 25.032 (1961), Fla. App. Rules, R.4.61 (1967).

Statutes Involved

Florida Annotated Statutes, § 25.031, provides:

> "The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the

supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

Florida Annotated Statutes, § 25.032, provides:

"The supreme court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort, of other states and of the United States, in the preparation and approval of uniform rules of court to make effective this and similar laws."

Florida Appellate Rule 4.61, promulgated by the Supreme Court of Florida, provides:

Rule 4.61. CERTIFIED QUESTIONS FROM FEDERAL COURTS

a. When certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a. hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a. hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the Clerk of the Supreme Court by the Clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

Statement of the Case

These petitioners are named as defendants in stockholders' derivative actions brought on behalf of Lum's, Inc. (hereafter "Lum's"), a Florida corporation. The complaints assert no claim under federal law; jurisdiction is founded solely on diversity of citizenship.

The complaints allege, in substance, that the chief executive officer of Lum's imparted to an employee of Lehman Brothers confidential corporate information, prior to any public announcement, that the earnings of Lum's would be lower than those previously announced. It is alleged that through the Lehman representative this information came to two employees of IDS who were portfolio managers of the funds,* and that they caused the funds to sell stock of Lum's at a higher price than that to which the price dropped when the information was announced to the public.

The *Schein* complaint asserts that petitioners "are liable to Lum's for their unlawful profits (including commissions) and are liable to Lum's for the damages it sustained thereby" (20a, ¶ 25). The *Gregorio* complaint seeks to require petitioners to account to Lum's for profits, but does not allege that Lum's sustained any damage (30a, ¶ 22).

These petitioners and other defendants moved under F.R.C.P. 12(b)(6) to dismiss the complaints for failure to state a claim on which relief can be granted. The plain-

* IDS acts as the investment advisor to the funds.

tiffs at first urged that New York substantive law applied, but they later conceded the applicability of Florida law. Judge Tyler of the District Court dismissed the complaints.

Judge Tyler found no Florida Supreme Court precedent in point, but noted that lower Florida courts had held that a stockholder's derivative complaint must allege some damage to the corporation. Since in the *Schein* case there was a conclusory allegation of damage, and since a Florida court might consider the law of other states, Judge Tyler proceeded to examine the sufficiency of the complaints in the light of a New York case which the plaintiffs urged as support, *Diamond* v. *Oreamuno,* 24 N.Y. 2d 494, 248 N.E. 2d 910 (1969).

The *Diamond* case, admittedly without precedent, upheld a complaint in a derivative action seeking recovery of profits from corporate directors made by their selling stock on the basis of inside information. Judge Tyler held that the complaints in these actions as against these petitioners went beyond the rationale of *Diamond*, which centered on the fiduciary duties of the defendants there, because IDS and the funds owed no "fiduciary duties whatsoever to [Lum's]" (55a).

On appeal, the Court of Appeals reversed in a 2-1 decision, and found the complaints sufficient. The majority opinion, by Judge Waterman, said there was no Florida precedent, but turned to New York law and the *Diamond* case, and said that the question was whether the holding of that case "should extend to reach third parties" who were "involved with directors in a common enterprise" (67a). The majority said that *Diamond* "has the prophylactic effect of providing a disincentive to insider trading" which "ought to reach third parties," and held that it should be so extended, closing with a number of citations of federal

securities law cases finding violations of federal law in the use of inside information (73a).

A dissenting opinion, by Judge Kaufman, agreed that profiting by insider trading was reprehensible, but said that the majority had made "an extraordinary, expansive, and incorrect reading of New York law" (74a) and had substituted "its own view of what state law ought to be, for what the state law actually is" (80a). He noted that private and government suits under federal law provided full remedies to purchasers of stock (73a-75a), but that this did not mean that *"under state common law,* tippee trading is a breach of fiduciary duty owed to the corporation whose shares are traded," which is remediable in a shareholder's derivative action (79a).

He further noted that there was not even an allegation that the petitioners concocted a prearranged scheme, which would be a prerequisite to suit based on the "common enterprise" theory embraced by the majority.

Concluding, Judge Kaufman said (80a-81a) that he failed to comprehend why the majority refused to utilize Florida's certified question statute (pp. 2-3, *supra*), providing for certification to the Florida Supreme Court by a federal court of an unresolved question of Florida law determinative of a case before it, on which there are no clear, controlling Florida Supreme Court precedents.

Whether it was error not to have used this Florida procedure for certification is the question as to which this Court has granted certiorari.

ARGUMENT

The Problem of Uncertainty of State Law in Federal Diversity Cases

In *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), the Court held that the federal courts in diversity cases are constitutionally bound to follow the common law of the appropriate state rather than any "federal general common law." Where state common law is clear from state precedents, this may not be difficult, but there has been a recurrent problem as to how to deal with cases where there is no precedent. This is such a case.

Both lower courts agreed that the governing law as to whether the complaints state a claim is that of Florida, and that the question determinative of the sufficiency of the complaints has never been decided by a Florida court. The duty of a federal court in a case like this one, brought in New York and with the applicable law that of another state, was aptly described by Judge Friendly in *Nolan* v. *Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), as follows:

> "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."

The *Nolan* case involved an attempt to determine the answer to a question of the applicability of a California statute of limitations, and the Second Circuit based its holding on decisions of intermediate California appellate courts. Subsequently, this Court remanded the case (365 U.S. 293 (1960)) for consideration of whether the New York Court of Appeals would have decided otherwise on the basis of a dictum in a later California Supreme Court

case. On the remand, the Second Circuit adhered to its original decision, but bemoaned the absence of procedure which would permit the apparent conflict to be "settled by the only court that can authoritatively determine it"—namely the California Supreme Court. 290 F.2d 904, 905 (2d Cir. 1961).

In the instant case, such a procedure was available through the Florida certification statute and rule which would permit an authoritative determination by the Florida Supreme Court. The Court of Appeals, however, paid only lip service to its duty, undertook no analysis of the policy or decisional law of Florida, and did not use the certification procedure, but speculated on Florida law by extending an unprecedented New York decision beyond its limitations.

This case is precisely the kind with which the Florida statute and rule providing for federal appellate court certification of a question of Florida law to the Florida Supreme Court was designed to deal. We submit that it was clear error not to utilize the procedure.

The Duty to Decide Uncertain State Questions and Abstention as a Possible Course

This Court has treated in different ways the problem faced by federal courts in diversity cases where a controlling question of state law has not been decided by state courts. On the one hand, the Court has held that dismissal of a complaint without prejudice to proceeding in a state court, on the ground that applicable state law is not clearly settled, is not proper, because the federal courts have a duty to decide the question of state law. *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943). On the other, abstention by lower federal courts from deciding a question until after determination of a state law question in a state court

proceeding, pending or to be brought, has been directed or approved. See, e.g. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *Louisiana Power & Light Co.* v. *Thibodaux City*, 360 U.S. 25 (1959); *Kaiser Steel Co.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968).

A common case for abstention is one where there may be a state court interpretation of a state statute which may avoid a federal constitutional question. E.g., *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 510-11 (1972). Other situations have also been held to justify abstention. In general, the Court has upheld it in cases where there might be interference with a state policy by a federal court decision. E.g., *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942); *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Martin* v. *Creasy*, 360 U.S. 219, 224 (1959).

The question of law involved in this case is certainly one that involves the policy of the State of Florida as to Florida corporations. Whether Florida wishes to adopt the rule of the *Diamond* case, which appears to be unprecedented in New York,* so as to permit a Florida corporation to recover damages in a derivative suit against corporate fiduciaries when the corporation has not actually been damaged in any traditional sense, is a question of policy. And whether Florida wants to extend that rule to allow recovery against non-fiduciary stockholders who have traded on the basis of inside information is even more a policy question which should be decided by a Florida court.

Judge Kaufman's dissent noted (78a, fn. 3) the unlikelihood that New York itself would have made such an extension. He pointed out that the New York Appellate Division in the *Diamond* case had affirmed dismissal of

*As was noted by Judge Fuld in *Diamond*, 24 N.Y. 2d at 500, 248 N.E. 2d at 913.

the complaint against directors—fiduciaries—who had "approved, acquiesced in or ratified" the transactions involved, but had not profited.

Judge Tyler had no way to refer the question to the Florida court, since the procedure for certification under the Florida statute and rule is open only to a federal appellate court. Since he could not himself put the issue to a Florida court, he was not wrong in obeying the mandate of *Meredith* v. *Winter Haven, supra,* that it is the duty of federal courts in diversity cases to decide state law questions, no matter how difficult and uncertain a decision may be.

The Second Circuit's Error in Not Using Certification

When the case reached the Second Circuit, the possibilities were different. Instead of attempting to engraft upon Florida law an unprecedented new rule, the Court of Appeals could and should have obtained a decision from the highest court of Florida by certification. This would have involved abstaining only for the length of time required for presentation and decision of the question in the Florida Supreme Court.

The majority in the Court of Appeals may be said to have disregarded the rule of *Erie R.R.* v. *Tompkins, supra,* by, in effect, adopting for Florida a "federal common law" and as Judge Kaufman noted in dissent, substituting "its own view of what state law ought to be for what the state law actually is" (80a). Judge Kaufman recognized and agreed with the view that the use of inside corporate information as a motivation for stock dealings is reprehensible, but disagreed that Florida law provides a cause of action to the corporation whose shares were traded. Federal courts, interpreting and applying federal securities statutes, have expanded the scope of liability of partici-

pants in such activity to those damaged by it, and the majority below relied largely on such expansive precedents, in justifying its "stretch" of the *Diamond* case. In so doing it ignored the fact that under *Erie* it was the court's duty to apply *Florida* law, and that the Florida courts might or might not feel that the corporate law of that state should be applied to have "the prophylactic effect of providing a disincentive to insider trading" (69a).

The question which the Court has posed by the grant of certiorari relates to a Florida statute. It has always been the law, even prior to *Erie*, that in a diversity case a state statute on a substantive question must be given effect by a federal court. While the Florida statute here involved is not substantive it clearly expresses a Florida policy of preferring that questions of Florida substantive common law should not be the subject of speculation by the federal judiciary and, in the absence of "clear controlling precedents," such questions should be decided by the Florida Supreme Court through certification. That policy should have been given effect here by the Court of Appeals, through certification to the Florida Supreme Court.

Abstention and Its Disadvantages

A situation in which a federal court's interpretation of state law is subsequently rejected by state courts is obviously unfortunate, but is not rare. In a dissenting opinion in *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 388 F.2d 257 (10th Cir. 1967), Judge Brown in the Tenth Circuit, urging federal court abstention pending a state court determination, collected (388 F.2d at 264-65, notes) a large number of examples of such rejections.

Judge Brown's view was adopted by this Court, which ordered abstention *per curiam*. *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968). Abstention, in the

absence of a certification procedure, is not always a wholly satisfactory solution. It may require the institution of new state court litigation, frequently by way of declaratory judgment action, in the lower courts. The delay and expense of independent state litigation, including appellate procedures to obtain review in the state's highest court, are undesirable consequences. And the result, realistically, may be to deprive the parties of the right conferred by diversity jurisdiction to have the litigation determined under federal procedure. It has been noted that abstention may deny the right to have the facts found by a federal court. Cf. *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415-17 (1964).

Advantages of Certification

The problems of abstention are largely avoided by certification. The federal court may frame the legal question to which it needs an answer, and may submit it directly to the highest state court, which can give a reasonably prompt answer. The federal court retains control of the basic litigation, and resolves all other questions.

The Florida certification statute and rule as a solution to the difficulties of federal court determination of state law questions has been widely praised and used. This Court has itself employed the procedure in three cases. *Clay* v. *Sun Insurance Office, Ltd.,* 363 U.S. 207 (1960); *Dresner* v. *City of Tallahassee,* 375 U.S. 136 (1963); *Aldrich* v. *Aldrich,* 375 U.S. 75 (1963). The Fifth Circuit, within whose boundaries Florida is situated, has frequently resorted to certification in cases involving Florida law. Numerous instances are collected in *Boyd* v. *Bowman,* 455 F.2d 927, note 1 (5th Cir. 1972). The Fifth Circuit has repeatedly extolled the virtues of the practice as avoiding guesswork as to what the Florida Supreme Court would hold. E.g., *Hopkins* v. *Lockheed Aircraft Corp.,* 394 F.2d

656, 656-57 (5th Cir. 1958); *Martinez* v. *Rodriguez*, 410 F.2d 729, 730, 731, note 5 (5th Cir. 1969). The opinion in the latter case also praised the promptness with which the Florida Supreme Court has acted (410 F.2d at 731, note 7).

This Court has on occasion indicated a view that it should leave undisturbed determinations of doubtful questions of state common law when they are made by courts of appeals which are constantly required to deal with such questions relating to states within their geographical areas. *Estate of Spiegel* v. *Comm'r*, 335 U.S. 701 (1949). This emphasizes the particular value of resort to certification, where it is available, by a federal court required to interpret the law of a state remote from its boundaries, as was the case with the Second Circuit in dealing with Florida law.

The problem of federal determination of state law, and the solutions of abstention and certification, have been the subject of many law review comments. Although doubts have been expressed about abstention pending independent state litigation, as an avoidance of federal court responsibility, the certification procedure has often been commended by writers. See, e.g., Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 Tex. L. Rev. 194, 209-10 (1964); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344, 350 (1963); Vestal, *The Certified Question of Law*, 36 Iowa L. Rev. 629, 644-45 (1951); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L.J. 187, 214 (1957); Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 Yale L.J. 850, 867-69 (1964); Lillich and Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. Rev. 888 (1971); Note, *Louisiana Power & Light* v. *Thibodaux: The Abstention Doctrine Expanded*, 69 Yale L.J. 643 (1960); and Note, *Federal*

Abstention and Its Relation to the Erie Doctrine, 38 Temp. L.Q. 72 (1964).

The National Conference of Commissioners on Uniform State Laws has recommended a proposed Uniform Certification of Questions of Law Act or Rule for the certification of questions of law between jurisdictions, and the American Bar Association has approved the recommendation. The procedure is specifically directed to the problem under *Erie R.R.* v. *Tompkins, supra,* of ascertaining state law when it is doubtful, and the proposed Uniform Rule is patterned in large measure on Florida Appellate Rule 4.61, *supra,* p. 3.

The American Law Institute has also approved a codification of certification by federal courts to the highest state courts of questions of law. *ALI, Study of the Division of Jurisdiction Between State and Federal Courts,* § 1371(e) p. 50 (1969). Again, the proposal is broad, and the advantages of certification over abstention are noted (pp. 292-296).

The Florida statute and rule appear to be the prototype of certification procedures. There are, however, at least nine other states which have provided for it. Colorado: Rule 21.1, Appellate Rules; Hawaii: Rev. Stat. § 602-36; Louisiana: Rev. Stat. Ann. 13, § 13.72.1; Maine: Rev. Stat. Ann., Tit. 4, § 57; Maryland: Ann. Code, Art. 26, § 161; Massachusetts: Supreme Judicial Court Rules, R.3:21; Montana: Rule 1, Rules of the Montana Supreme Court; New Hampshire: Rev. Stat. Ann. § 490; Washington: Rev. Code Ann. § 2.60. There are reported cases of the utilization of certification in five of these states.*

* The First Circuit has used the New Hampshire procedure, *Ford* v. *Blue Mountain Tramways, Inc.,* 110 N.H. 20, 259 A.2d 129 (1969). In Maine, Washington, Montana and Maryland, where certification may be asked by federal district courts, they have done so. *Pierce* v. *Secretary,* 254 A.2d 46 (Me. 1969); *Norton* v. *Benjamin,* 220 A.2d 248 (Me. 1966); *In re Richards,* 223 A.2d 827 (Me. 1966); *In re Elliott,* 74 Wash. 2d 600, 446 P.2d 347 (1968); *Irion* v. *Glens Falls Ins. Co.,* 154 Mont. 156, 461 P.2d 199 (1969). *Smith* v. *Gray Concrete Pipe Co., Inc.,* 267 Md. 149, 297 A.2d 721 (1972).

Summary of the Importance of This Case and of Encouragement of Certification

The question presented by this case is a narrow but important one. Its importance arises out of the responsibilities which diversity jurisdiction places on the federal courts. The *Erie* case made it clear that those responsibilities require federal court determination of state common law rather than creation of some general common law. And *Meredith* v. *Winter Haven,* supra, held that the responsibility cannot be avoided by federal refusal to decide questions of state law because the answers are not clearly settled by state precedents.

Nevertheless, a dilemma of diversity jurisdiction is that a federal court determination of undecided state law may prove to be contrary to what state courts later decide is state policy. One solution to the dilemma—federal court abstention from decision until the question of state law has been decided in independent pending or potential litigation in the state courts—frequently results in delay and expense, and may deprive litigants of rights to which federal diversity jurisdiction entitles them.

A preferable solution which, as we have seen, a number of states and notably Florida have made possible is certification by the federal courts to the highest state courts of legal questions pursuant to state statutes or rules. The states which have adopted such procedures have thereby indicated their preference that questions of state law be determined by state courts, and their willingness to cooperate in aiding the federal judiciary to this end.

The general approbation of certification has been noted. Unless the procedure is used by the federal courts, however, it has no value. Its frequent use will encourage other states to adopt statutes and rules authorizing it. The desirability of this was recognized in a concurring opinion in *England*

v. *Louisiana State Board of Medical Examiners, supra,* by Justice Douglas, who said:

> "We cannot require the States to provide such a procedure; but by asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use" (375 U.S. at 433-34).

This is an ideal case for the Court to encourage the use of certification and its broader adoption. What the two-judge majority of the Court of Appeals did here is a perfect example of the potentially unfortunate results of speculation by a federal court on an undecided state law question, rather than obtaining a definitive state determination by certification. In relying for Florida law on a New York precedent which itself was a departure from any prior case, deciding that the "stretch" of *Diamond* (68a) reached these petitioners, and admittedly expanding it beyond what New York has decided, the Court of Appeals undertook to decide on Florida policy, which it is neither equipped nor entitled to do. To permit the decision to stand, with the majority's heavy emphasis upon policies enunciated in federal precedents under federal statutes rather than focusing on "the strands of duty running to the corporation from the various individuals involved" (75a) in the alleged breach of common law fiduciary duty, would be to encourage a return to "federal general common law." If Florida wishes to embrace such policies as a matter of Florida corporate law, it can do so upon certification, but it may have a different desire.

The Clarity of This As a Case for Certification

There may be instances where it may not be clear to a federal court that, in the words of the Florida statute, "there are involved in any proceeding before it questions or propositions of the laws of [Florida], which are deter-

minative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state . . . ." This, however, is not such a situation. Both the District Court and the Court of Appeals recognized that whether Florida law permitted the claims asserted against these petitioners was determinative, and both recognized that not only were there no "clear controlling precedents," but that there were no precedents.

It is not necessary for the Court to hold that in every situation where it is suggested that there is doubt as to state law, and where a certification procedure is available, the procedure must be employed. We urge, however, that certification should be mandated when state law on a determinative question which involves policy is wholly lacking.

Conclusion

The decision of the Court of Appeals for the Second Circuit should be reversed, and the case remanded to that court with a direction to certify to the Supreme Court of Florida an appropriately worded question or questions for the purpose of determining whether the complaints state a claim on which relief may be granted under Florida common law.

Respectfully submitted,

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